American Automatic Fire Protection, Inc. *and* Sprinkler Fitters and Apprentices Local Union No. 483, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. Case 20–CA–20325

May 17, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On May 24, 1989, Administrative Law Judge George Christensen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

Since 1978, the Respondent and the Union have entered into successive collective-bargaining agreements pursuant to Section 8(f) of the Act. The most recent contract covered the term from August 1, 1984, to July 31, 1987. On August 15, 1984, the Respondent subcontracted to install sprinkler systems on a project known as Spring Lake.

The relationship between the Respondent and the Union began to deteriorate in the fall of 1985. On September 12, 1985, the Union filed a grievance alleging that the Respondent was violating the collective-bargaining agreement by employing nonunion sprinkler fitters on the Spring Lake project. The Respondent, on September 18, 1985, filed a grievance alleging violation by the Union of section 8 of the collective-bargaining agreement, which provides, inter alia, that ''a fair day's work be performed at all times and that the highest possible standard of work shall be maintained.''

Thereafter, by letter dated November 29, 1985, the Respondent notified the Union that it was repudiating the collective-bargaining agreement. Since that date, the Respondent has failed to comply with any of the terms of the agreement. On December 31, 1985, the Respondent terminated the two remaining union fitters on the Spring Lake project, Joseph Cerrito and Tom Bell. Subsequently, by letter dated April 8, 1987, the Union requested that the Respondent honor the collective-bargaining agreement. The Respondent failed to answer the Union's request.

On May 2, 1986, the Union filed a charge in this case alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Cerrito and Bell. On June 2, 1987, the Union filed a first amended charge alleging that ''the [Respondent] refuses to honor its contract with the [Union].''[3] Thereafter, on October 28, 1987, an amended complaint issued alleging, inter alia, that the Respondent had violated Section 8(a)(5) and (1) of the Act by, since on or about December 2, 1986, failing and refusing to abide by the collective-bargaining agreement.

The judge found that under *John Deklewa & Sons, Inc.*,[4] the collective-bargaining agreement was viable for its full term and therefore enforceable throughout that term. In essence applying a continuing violation theory, the judge found that the dismissal of the charge in Case 20–CA–21164 alleging violation of the Act by the November 1985 contract repudiation did not preclude a finding that the Respondent violated the Act by

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also correct the following inadvertent errors by the judge which do not affect our decision. In sec. IV, par. 16 of his decision, the judge stated that the contract repudiation occurred on November 20, 1985; in sec. IV, par. 21, the judge stated that the repudiation occurred in November 1984. The contract repudiation occurred on November 29, 1985. In sec. IV, par. 12, the judge indicated that after March 14, 1986, to July 1986, the Respondent employed sprinkler fitters at the Spring Lake project at rates far below those set out in the collective-bargaining agreement between the Respondent and the Union. The record indicates, however, that sprinkler fitters employed on the project after March 14, 1986, were paid at the journeyman wage ($28.59 per hour) set forth in the collective-bargaining agreement.

[2] In concluding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by terminating Joseph Cerrito and Tom Bell, the judge relied, inter alia, on his finding that the Respondent paid its nonunion fitters prior and subsequent to the terminations considerably less than the rates set forth in the collective-bargaining agreement. In agreeing with the judge that the terminations violated the Act, we do not rely on this finding to the extent it indicates that after March 14, 1986, the nonunion fitters were paid less than the contract rate.

Further, we recognize that the judge did not specifically consider under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Respondent's contention that the terminations occurred because the work on the Spring Lake project was completed. According to the credited testimony, however, the sole reason given to the employees for the terminations was the Respondent's desire to complete the project with nonunion workers. The judge thus implicitly discredited the Respondent's contention regarding completion of work. In light of this credibility resolution, it was unnecessary for the judge to consider under a Wright Line analysis the Respondent's ostensibly legitimate reason for the terminations, as the credited testimony indicates that the Respondent did not rely on that reason.

In agreeing with the judge's conclusion that Leland Lawson is a supervisor within the meaning of Sec. 2(11) of the Act, we rely solely on the record evidence that Lawson exercised independent judgment in assigning work and responsibly directing employees.

[3] The Union had earlier, on April 30, 1987, filed a charge in Case 20–CA–21164 alleging that the Respondent violated Sec. 8(a)(5) and (1) by its November 29, 1985 repudiation of the contract. On June 25, 1987, the Regional Director for Region 20 dismissed that charge as untimely under Sec. 10(b) of the Act, noting that the charge had been filed more than 6 months after the Respondent's repudiation of the collective-bargaining agreement. The Union did not timely appeal the dismissal.

[4] 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

failing to comply with the Union's April 8, 1987 request that the Respondent honor the collective-bargaining agreement for the remainder of its term. The judge concluded, accordingly, that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to comply with the Union's April 1987 request that the Respondent honor the agreement for the remainder of its term.

The Board has recently held that the continuing violation theory cannot properly apply to a clear and total contract repudiation. *A & L Underground*, 302 NLRB 467 (1991). Consequently, a charge alleging contract repudiation or, as in this case, a refusal to honor a contract, is barred by Section 10(b) if filed more than 6 months after notice of a clear and unequivocal repudiation of an entire collective-bargaining agreement. In this case, the charge alleging the Respondent's refusal to honor the contract was filed on June 2, 1987, well beyond 6 months after the Union received clear and unequivocal notice in November 1985 of the Respondent's total repudiation of the collective-bargaining agreement. We find, accordingly, that the charge is barred by Section 10(b).[5] We shall therefore dismiss that portion of the complaint alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing, since on or about December 2, 1986, to honor the collective-bargaining agreement.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 7.

''7. The Respondent did not violate the Act by failing and refusing to comply with the Union's April 1987 request that the Respondent honor the agreement for the remainder of its term.''

REMEDY

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Joseph Cerrito and Tom Bell because of their membership in and support of the Union, the Respondent is ordered to offer them immmediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions,[6] without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any losses they may have suffered as a result of the discrimination against them, with backpay to be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, American Automatic Fire Protection, Inc., Rio Linda, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating employees because of their union membership and support.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Joseph Cerrito and Tom Bell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Rio Linda, California, and any other locations where notices to employees are customarily posted copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] In light of our finding that the charge is barred by Sec. 10(b), we need not pass on the Respondent's argument that the corresponding remedy recommended by the judge is improper. Similarly, we need not pass on the Respondent's contention that the Board is collaterally estopped from finding an 8(a)(5) and (1) violation by the decision in *National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F.Supp. 731 (D. Md. 1988). We do not adopt, however, the judge's assertion that the Respondent at trial neither cited nor produced a copy of that decision.

[6] We leave to compliance the question of whether reinstatement is an appropriate remedy in this case. *Dean General Contractors*, 285 NLRB 573 (1987).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

MEMBER DEVANEY, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Joseph Cerrito and Tom Bell. Contrary to my colleagues, however, I believe that the charge filed on June 2, 1987, alleging that the Respondent had failed and refused to honor the parties' collective-bargaining agreement was timely filed. In this regard, I note the charge was filed during the term of the parties' collective-bargaining agreement, which expired on July 31, 1987. For the reasons stated in my dissenting opinion in *A & L Underground*, 302 NLRB 467 (1991), I hold the charge timely and would consider the 8(a)(5) allegation on its merits.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate employees because of their union membership or support.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Joseph Cerrito and Tom Bell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings or other benefits suffered as a result of our discrimination against them, with interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

AMERICAN AUTOMATIC FIRE PROTECTION, INC.

Christine Ralls, Esq., for the General Counsel.
Robert L. Rediger, Esq. (Hubbert, Shanley & Lee), of Sacramento, California, for the Respondent.
Joseph R. Colton, Esq. (Beeson, Tayer, Silbert & Bodine), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On August 2 and 3, 1988, I conducted a hearing at Sacramento, California, to try issues raised by a complaint issued on June 25 and amended on October 28, 1987, based on an original and an amended charge filed by Sprinkler Fitters and Apprentices Local Union No. 483, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Local 483) on May 2, 1986, and June 2, 1987.

The issues created by the complaint allegations and denials by American Automatic Fire Protection, Inc. (AAFP) are whether at pertinent times: (1) AAFP employed fitters within an appropriate bargaining unit covered by a contract between AAFP and Local 483 to perform building and construction industry work within the meaning of Section 8(f) of the National Labor Relations Act (the Act); (2) Local 483 was the duly designated exclusive collective-bargaining representative of those fitters and recognized as such by AAFP; (3) Leland Lawson was a supervisor and agent of AAFP acting on its behalf within the meaning of Section 2 of the Act; (4) AAFP discharged fitters Joseph Cerrito and Tom Bell in December 1985 because of their affiliation with and support of Local 483, thereby violating Section 8(a)(1) and (3) of the Act; and (5) AAFP violated Section 8(a)(1) and (5) of the Act by failing to comply with Local 483's 1987 request to honor its contract with Local 483 for the balance of its term, i.e., between December 2, 1986 and July 31, 1987.

Ancillary issues arise from AAFP's contentions: (1) because it repudiated its 1984–1987 contract with Local 483 on November 29, 1985, and Region 20 on June 26, 1987, dismissed Local 483's April 30, 1987 charge in Case 20–CA–21164 alleging AAFP violated Section 8(a)(1) and (5) by that repudiation on the ground the charge was untimely filed under Section 10(b) of the Act (Local 483 failed to timely appeal that dismissal), the 8(a)(5) allegations of the complaint in this case should be dismissed; and (2) because a United States district court issued a decision holding AAFP was not obligated to tender payments to various funds pursuant to the terms of the 1984–1987 AAFP-Local 483 contract for any months following AAFP's November 1985 repudiation of that contract, the Board is collaterally estopped from finding AAFP violated Section 8(a)(1) and (5) of the Act by failing or refusing to honor Local 483's 1987 request that AAFP honor the 1984–1987 AAFP-Local 483 contract between December 2, 1986, and July 31, 1987.

The General Counsel (GC) and AAFP appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Both filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs, and research, I enter the following

FINDINGS OF FACT[1]

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find at all relevant times AAFP was an employer engaged in commerce in a business affecting commerce and Local 483 was

[1] Although every apparent or nonapparent conflict in the evidence has not been resolved below, because my findings are based on my examination of the entire record, my observation of the demeanor of every witness while testifying, and my evaluation of the reliability of their testimony, any testimony in the record which is inconsistent with my findings is discredited.

a labor organization within the meaning of Section 2 of the Act.

II. THE UNIT, LOCAL 483'S REPRESENTATIVE STATUS, THE INDUSTRY, AND THE CONTRACT

James Ervin and his wife formed AAFP in 1978 to engage in the business of installing sprinkler systems in newly constructed and retrofitted commercial buildings and residences. AAFP commenced doing business in the Sacramento, California area and spread into northern California. Since its inception the business has been managed by James Ervin, assisted by Jim Low.

AAFP regularly employed fitters to install sprinkler systems. In 1978, AAFP signed its initial contract with Local 483 covering the wages, hours, and working conditions of fitters it employed within Local 483's geographical jurisdiction, securing those employees through Local 483's hiring hall. AAFP also maintained contractual relations with a sister local (Local 669) and secured sprinkler fitters through its hiring hall.[2]

AAFP executed a continuing series of contracts with Local 483, including a contract executed on December 26, 1984, for a term extending from August 1, 1984, through July 31, 1987.

Although AAFP denied in its answer the complaint allegation the job classifications[3] covered in the 1984–1987 AAFP-Local 483 contract constituted a unit appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act and that since 1978 AAFP has recognized Local 483 as their exclusive collective-bargaining representative, in the course of the hearing AAFP stipulated the unit was appropriate for collective-bargaining purposes and AAFP through the successive contracts recognized Local 483 as the exclusive collective-bargaining representative of its employees within the unit.

On the basis of the foregoing, I find and conclude at all pertinent times AAFP was an employer engaged in business within the construction industry within the meaning of Section 8(f) of the Act; a unit consisting of AAFP's employees within the classifications covered by AAFP's 1984–1987 contract (and prior contracts) with Local 483 constituted a unit appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act; by its December 26, 1984 execution of the 1984–1987 contract with Local 483, AAFP recognized Local 483 as the exclusive collective-bargaining representative of AAFP's employees within the classifications set out in the contract for the term thereof; and by virtue of the foregoing, Local 483 was the duly designated exclusive collective-bargaining representative of AAFP's employees within those classifications to and including July 31, 1987.[4]

[2] Local 669 at all times had geographical jurisdiction over a broad, general geographical area and supplied fitters in and from a broad area throughout the United States while Local 483's geographical jurisdiction was limited to northern California and it supplied fitters in and from that area.

[3] Journeyman fitters, apprentice fitters, and one journeyman designated as job foreman on each job.

[4] *John Deklewa & Sons, Inc*. 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

III. THE STATUS OF ERVIN AND LOW

I further find and conclude (as conceded by AAFP) at all pertinent times Ervin and Low were supervisors and agents of AAFP acting on its behalf within the meaning of Section 2 of the Act.

IV. THE CONTRACT REPUDIATION, LAWSON'S STATUS, AND THE ALLEGED DISCRIMINATORY DISCHARGES

On August 15, 1984, AAFP entered into a contract with General Contractor Williams and Burrows (W & B) to install overhead sprinkler systems, including connecting piping, in 50 buildings on a 27-acre site in Santa Rosa, California, known as Spring Lake Village, A Life Care Retirement Community. The W & B-AAFP contract, inter alia, required AAFP to utilize union-represented workers exclusively in performance of the contract. The Spring Lake project or job was within the geographical jurisdiction of Local 483. Anticipating the possibility Local 483 at times would be unable to supply a sufficient number of fitters from its hiring hall[5] to meet its needs, AAFP secured Local 483's agreement to AAFP's securing fitters through Local 669's hiring hall, provided Local 483 was unable to fill its needs and AAFP requiring fitters secured through Local 669's hall to clear for AAFP employment through Local 483's hall.

AAFP commenced work at the Spring Lake project shortly after the W & B-AAFP contract was signed. AAFP's work on the project progressed satisfactorily until the spring of 1985, when AAFP ceased relations with Local 669 and no longer was able to secure fitters through Local 669's hiring hall. From that time, AAFP's work pace began to slip behind that of other crafts on the project, generating complaints by W & B's field superintendent charged with timely completion of the job, Ralph Eslick. Ervin responded with the representation he would bring in nonunion fitters during hours Local 483-represented fitters were not there (at night and on weekends) in an effort to keep up, and began doing so.[6]

In July 1985, approximately nine Local 483-represented fitters were employed by AAFP at the Spring Lake project, including journeyman Joseph Cerrito, designated as the job foreman of the Local 483-represented fitters on the job. AAFP recognized Local 483 as their exclusive collective-bargaining representative and compensated them in accordance with the terms of the 1984–1987 AAFP-Local 483 contract.

Cerrito took instructions from Leland Lawson, who had been hired by Ervin as ''project manager'' at the job,[7] since Ervin and Low rarely visited the jobsite although Lawson was there most of the time. Lawson directed the work of AAFP's fitters at the jobsite either through issuing directions to Cerrito for transmission to the other fitters or issuing directions directly to the fitters, assigned and reassigned fitters to various tasks, decided what work was to be done and in

[5] The 1984–1987 AAFP-Local 483 contract required that AAFP secure fitters to man its jobs within Local 483's jurisdiction through Local 483's hiring hall.

[6] These findings are based on testimony by Eslick and Ervin, supported by documentary evidence (payrolls) AAFP, beginning in early 1985, utilized both Local 483-represented fitters and nonunion fitters to perform work on the W & B-AAFP contract.

[7] Ervin consulted Local 483 prior to hiring and assigning Lawson to the job and ascertained Local 483 had no objection to Lawson's hire and assignment, based on Ervin's assurances Lawson would not perform any fitter work at the site and would be limited to directing and checking work at the site and maintaining liaison with W & B.

what order, maintained time records, issued paychecks, hired fitters by contacting Local 483's hiring hall, evaluated the fitters' job performance and acted as AAFP's liaison with W & B.[8]

Eslick continued to complain that AAFP was failing to keep pace with the other crafts and Cerrito, attempting to respond thereto, asked Ervin to increase the size of the crew. Ervin responded if the current crew couldn't maintain the pace, he would bring in nonunion help (which he was already doing surreptitiously at night and on weekends). Cerrito responded if he did, he and the other Local 483-supplied fitters would leave the job and Local 48 would cease supplying fitters for any other AAFP job.

The number of Local 483-supplied fitters employed by AAFP on the job continued to dwindle and the Local 483-represented fitters became increasingly aware fitters work was being performed on the project during their absence.

They reported this to Local 483 and Local 483 filed a grievance with AAFP alleging by its employment of nonunion fitters at the project AAFP was violating the 1984–1987 AAFP-Local 483 contract. AAFP countered with a complaint and grievance Local 483 as violating the contract by supplying inadequately trained fitters, fitters who were failing to report when scheduled to work, and fitters who were not performing a full day's work.

AAFP and Local 483 were unable to resolve their respective grievances and on November 29, 1985, AAFP formally notified Local 483 it was repudiating the 1984–1987 AAFP-Local 483 contract ''based upon your union's inability to attain majority status.'' At all times since AAFP has failed and refused to comply with any of the terms of the 1984–1987 AAFP-Local 483 contract.

By that time (November 1985) only two Local 483-represented fitters remained in AAFP's employment at the project, Cerrito and Thomas Bell,[9] AAFP's work at the project was still incomplete, however, and AAFP was continuing to employ nonunion fitter working under Lawson's direction, as well as Cerrito and Bell.

On December 5, 1985, Local 483 formally rejected AAFP's repudiation of the contract, stating the grounds relied on for that repudiation were invalid, the contract was still in full force and effect, and on December 23, 1985 filed another grievance alleging AAFP was violating the contract by hiring and assigning fitters to perform work at the Spring Lake project who were not referred from Local 483's hiring hall, who were not members of Local 483, and who were not being compensated in accordance with the provisions of the AAFP-Local 483 1984–1987 contract. AAFP refused to process the Local 483 grievances on the ground that AAFP-Local 483 contract was terminated by its November 1985 repudiation thereof.

On December 31, 1985, Lawson told Cerrito and Bell they were laid off. When asked why, Lawson responded AAFP had decided to go completely nonunion, and was going to complete the job with nonunion help (he earlier told Cerrito he could get nonunion help at far lower wages—as AAFP's payrolls show).

AAFP's work on the project was still incomplete in February 1986, when AAFP entered into a contract with Standard Fire Protection Company[10] to work on sprinkler installation at the project (Standard completed its work at the project on March 14, 1986). Lawson and others continued to work on the W & B-AAFP contract beyond that time, into July 1986, at rates far below those set out in the 1984–1987 AAFP-Local 483 contract, and without payment of fringe benefits.[11]

AAFP continued to work on completing the W & B-AAFP contract through July 1986, utilizing nonunion fitters.

Following the Board's issuance of its *Deklewa* decision,[12] Local 483 formally advised AAFP of the decision and requested that AAFP honor it 1984–1987 contract with Local 483. AAFP failed to respond and on April 30 1987, Local 483 filed a charge in Case 20–CA–21164 alleging AAFP violated Section 8(a)(1) and (5) of the Act by its November 29, 1985 repudiation of the 1984–1987 AAFP-Local 483 contract.

On June 26, 1987, Region 20 dismissed Local 483's April 30, 1987 charge in Case 20–CA–21164 on the ground the repudiation occurred more than 6 months prior to the filing of the April 30, 1987 charge and thus was untimely under Section 10(b) of the Act. Local 483 did not appeal the dismissal, but on June 2, 1987, amended its May 2, 1986 charge in this case (Case 20–CA–20325) to allege AAFP violated Section 8(a)(1) and (5) of the Act by failing and refusing to honor the 1984–1987 AAFP-Local 483 contract *on and after December 2, 1986*, i.e., from a date commencing 6 months prior to the date it filed its June 2, 1987 amended charge in this case.

On January 8, 1988, Local 483 asked the General Counsel to join the allegations of its April 30, 1987 charge in Case 20–CA–21164 (that AAFP has violated the Act since November 20, 1985, when it repudiated the AAFP-Local 483 1984–1987 contract, rather than since December 2, 1986, 6 months prior to its filing of the amended charge in this case, Case 20–CA–20325) to the complaint issued by the General Counsel in this case, stating Local 483 inadvertently failed to appeal Region 20's dismissal of Local 483's April 30, 1987 charge in Case 20–CA–21164.

On February 11, 1988, the General Counsel characterized Local 483's request as an appeal of Region 20's April 30, 1987 dismissal of Local 483's charge in Case 20–CA–21164 and ruled Local 483's claimed inadvertence an insufficient basis for accepting and processing the untimely appeal.

Deklewa and subsequent decisions[13] have established an employer in the construction industry violates Section 8(a)(1) and (5) of the Act by repudiating a prehire contract entered into with a labor organization prior to an NLRB-conducted election in which the labor organization in question failed to

[8] On the basis of these facts, I find and conclude at all pertinent times Lawson was a supervisor and agent of AAFP acting on its behalf within the meaning of Sec. 2 of the Act.

[9] Cerrito and Bell, however, after November 29, 1985, were placed on the payroll of a company called California Fire Control, a company owned and operated by Lawson, and paid the rates of pay set out in the AAFP-Local 483 contract plus additional pay equivalent to the value of the fringe benefits of that contract. The nonunion fitters were paid far less (for example, Bell was paid $42.17 per hour while nonunion fitter Allison was paid $28.59 and nonunion fitter Sipes, $11.85).

[10] Responding to a reminder by W & B its contract required use of union-represented fitters following W & B's receipt of a Local 483 complaint AAFP was employing nonunion fitters at the Spring Lake project.

[11] AAFP payroll records so establish.

[12] See fn. 4.

[13] *Meekins, Inc*., 290 NLRB 126 (1988); *Riley Electric*, 290 NLRB 374 (1988); *Bufco Corp*., 291 NLRB 1015 (1988); *Mesa Verde Construction Co. v. Laborers*, 129 LRRM 3073 (9th Cir. 1988).

establish majority representative status or the expiration of the contract.

Findings have been entered AAFP, at times pertinent, was an employer in the construction industry; AAFP entered into a prehire contract with Local 483 in December 1984 covering the wages, hours, and working conditions of fitters employed by AAFP within Local 483's geographical jurisdiction for a term extending from August 1, 1984, through July 31, 1987; AAFP partially complied with that contract through November 1985; in November 1985 AAFP repudiated that contract and thereafter failed and refused to comply with its terms.

Those facts establish a violation by AAFP of Section 8(a)(1) and (5) of the Act within the purview of *Deklewa* and subsequent decisions.

AAFP argues Region 20's dismissal of Local 483's charge in another case that AAFP violated the Act by its November 1984 repudiation on the ground the charge in that case was untimely filed and the General Counsel's refusal to add that charge to this case bars entry of a finding and conclusion AAFP violated the Act by failing and refusing to comply with the AAFP-Local 483 contract from a date 6 months prior to the date Local 483 filed an amended charge so alleging in this case.

Local 483 consistently has maintained the contract was viable and enforceable for its full term and based its June 2, 1987 amended charge on AAFP's failure and refusal to comply with its April 8, 1987 request that AAFP honor that contract for the remainder of its term on the *Deklewa* decision. If under *Deklewa* the contract is viable for its full term, then it is enforceable throughout that term and I so find and conclude, rejecting AAFP's contention the dismissal of the charge in another case (that AAFP violated the Act by its *November 1985* contract repudiation of the contract) bars the entry of a finding and conclusion Local 483 timely charged and the General Counsel proved AAFP violated the Act by failing and refusing to comply with Local 483's 1987 request that AAFP honor the AAFP-Local 483 1984–1987 contract for the balance of its term.

AAFP also contends the National Labor Relations Board (the Board) is collaterally estopped from entering the finding and conclusion just set forth by a previously issued United States district court decision denying funds named in the 1984–1987 AAFP-Local 483 payments required under the contract to the funds for months following the November 1985 AAFP repudiation of the contract.

AAFP neither cited nor produced a copy of the court decision and did not contradict the General Counsel's representation the court in its decision ruled the Board had primary jurisdiction to determine whether AAFP's failure and refusal to comply with Local 483's request that AAFP honor the contract for the balance of its term violated the Act.[14]

In view of the foregoing, I also reject AAFP's collateral estoppel contention.

I thus find and conclude AAFP violated Section 8(a)(1) and (5) of the Act by failing and refusing to comply with Local 483's April 1987 request to honor the 1984–1987 AAFP-Local 483 contract for the balance of its term.

I further find and conclude AAFP terminated Cerrito and Bell in December 1985 because of their membership in and support of Local 483. AAFP was paying its nonunion fitters employed at the Spring Lake project prior and subsequent to the Cerrito and Bell terminations considerably less than it had to pay Cerrito and Bell, the sole remaining Local 483-represented fitters employed at the project and, as Lawson advised Cerrito and Bell, felt it was free after the November 29, 1985 AAFP repudiation of the 1984–1987 AAFP-Local 483 contract to complete AAFP's work on the project with lower-paid, nonunion fitters, as it did following the Cerrito-Bell termination except for token compliance with its W & B contract (after receiving notice W & B had received a complaint from Local 483 over AAFP's noncompliance with the W & B-AAFP contract provision requiring the use of union-represented fitters at the project). It is obvious AAFP kept a few of the Local 483-represented fitters on the Spring Lake project to forestall any Local 483 complaints over its failure to fully man the project with Local 483-represented fitters (at considerably greater cost). When that strategy failed with the filing and inability to reach an adjustment of Local 483's grievances over that failure, AAFP abrogated its contract requiring the use of Local 483-supplied fitters, payment of the wages and benefits required thereunder, and the requirement it arbitrate Local 483's grievance. Shortly thereafter, feeling no need to maintain a token employment of Local 483-represented fitters at the wage and benefit levels they were receiving, AAFP laid off Cerrito and Bell because of their continued affiliation with and support of Local 483.

On the basis of the foregoing, I find and conclude AAFP violated Section 8(a)(1) and (3) by terminating Cerrito and Bell in December 1985.

CONCLUSIONS OF LAW

1. At all pertinent times AAFP was an employer engaged in commerce in the construction industry within the meaning of Sections 2 and 8(f) of the Act.

2. At all pertinent times Locals 483 and 669 were labor organizations within the meaning of Section 2 of the Act.

3. At all material times James Ervin, Jim Low, and Leland Lawson were supervisors and agents of AAFP acting on its behalf within the meaning of Section 2 of the Act.

4. AAFP employees in the job classifications set forth in the 1984–1987 collective-bargaining contract between AAFP and Local 483 constituted a unit appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act.

5. Between 1984 and July 31, 1987, Local 483 was the duly designated exclusive collective-bargaining representative of AAFP's employees in the classifications set forth in the 1984–1987 contract between AAFP and Local 483.

6. AAFP violated Section 8(a)(1) and (3) of the Act by terminating Joseph Cerrito and Tom Bell in December 1985 because of their membership in and support of Local 483.

7. AAFP violated Section 8(a)(1) and (5) of the Act by failing and refusing to comply with Local 483's 1987 request to honor the 1984–1987 AAFP-Local 483 collective-bargaining contract for the balance of its term.

8. The unfair labor practices specified above affected commerce as defined in Section 2 of the Act.

[14] In apparent recognition of the language of the Act (Sec. 10(a)) stating: ''The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . . .''

THE REMEDY

Having found AAFP engaged in unfair labor practices, I recommend AAFP be directed to cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Having found AAFP violated the Act by failing and refusing to comply with Local 483's April 1987 request to honor the 1984–1987 AAFP-Local 483 collective-bargaining contract for the balance of its term, I recommend AAFP be ordered to comply with that contract for the period December 2, 1986, through July 31, 1987, the date that contract terminated. Having found AAFP violated the Act by its termination of Joseph Cerrito and Tom Bell in December 1985, I recommend AAFP be ordered to make Cerrito and Bell whole for wage and benefit losses they may have suffered as a result of their unlawful terminations, with interest on their wage losses computed in accordance with the formulas of *New Horizons for the Retarded*, 283 NLRB 1173 (1987), *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co*., 138 NLRB 716 (1962), and moneys due the funds established for their benefit determined in accordance with the procedures set out in *Merryweather Optical Co*., 249 NLRB 1213, 1216 fn. 7 (1979). It is further recommended AAFP be ordered to make whole any persons denied an opportunity to work by AAFP's failure and refusal to honor the AAFP-Local 483 collective-bargaining contract between December 2, 1986, and July 31, 1987, for any wage and benefit losses they may have suffered, with the determination of the entitled individuals, the wages, the benefits and the fund payments due left to the compliance phase of this proceeding.

[Recommended Order omitted from publication.]